

Weir v Holland & Knight LLP

2010 NY Slip Op 32986(U)

October 18, 2010

Supreme Court, New York County

Docket Number: 603204/2007

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN
Justice

PART 57

Wein

INDEX NO. 603204/07

MOTION DATE _____

- v -

MOTION SEQ. NO. 005

Holland & Knight, LLP et al.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to *confirm referee's report*

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause <i>& cross-motion</i> — Affidavits — Exhibits ...	<u>1, 1A, 1B</u>
Answering Affidavits — Exhibits _____	<u>2, 2A, 2B</u>
Replying Affidavits _____	<u>3, 3A</u>
	<i>Remos of Law M1-M4</i>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *and cross-motion are*

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

FILED
OCT 25 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10-18-10

Marcy Friedman
MARCY S. FRIEDMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

FILED
OCT 25 2010
COUNTY CLERK'S OFFICE
NEW YORK

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x
JOHN K. WEIR,

Plaintiff(s),

Index No.: 603204/2007

- against -

HOLLAND & KNIGHT LLP et al.,
Defendant(s).

DECISION/ORDER

_____ x

In this employment discrimination action, plaintiff, an attorney proceeding pro se, alleges age discrimination and retaliation by his former employer, Holland & Knight, LLP (Holland). Defendants Holland, Robert Feagin, Brian Starer, John Reilly, William Honan, George Schultz, William DeMeza, and L. Kinder Cannon (collectively Holland defendants) move to confirm the report of Special Referee Leslie Lowenstein dated April 2, 2010. Plaintiff cross-moves for leave to extend the deadlines for the completion of discovery and the filing of the note of issue.

The following relevant facts are undisputed: By order dated January 22, 2009, this court referred the action to Referee Lowenstein for the supervision of discovery pursuant to CPLR 3104. After several discovery conferences, by order dated March 2, 2010, Referee Lowenstein directed plaintiff to file the note of issue in the action no later than March 31, 2010. By order dated April 2, 2010, the Referee determined that plaintiff had not filed the note of issue by the deadline, recommended to the court that plaintiff be ordered to file the note of issue, and recommended that “the court impose upon the plaintiff costs in the sum of \$2,500 and counsel fees to be further determined by the court [22 NYCRR 130-1.1 (a)] by reason of the

undersigned's finding that the plaintiff has engaged in frivolous conduct" due to his failure to timely file the note of issue. (See Referee's Report dated April 2, 2010, at 2, 3 [Ds.' Motion, Ex. I].)

"It is the function of a referee to determine the issues presented, as well as to resolve conflicting testimony and matters of credibility. Generally, courts will not disturb the findings of a referee so long as the determination is substantiated by the record. The recommendations of a special referee are entitled to great weight because, as the trier of fact, he has an opportunity to see and hear the witnesses and to observe their demeanor." (Poster v Poster, 4 AD3d 145 [1st Dept 2004], lv denied 3 NY3d 605; Rezzadeh v Lucas, 253 AD2d 698 [1st Dept 1998].) Thus, "the report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and resolved matters of credibility." (Nager v Panadis, 238 AD2d 135, 135-136 [1st Dept 1997]; United States Trust Co. of New York v Olsen, 194 AD2d 481 [1st Dept 1993]; Pittoni v Boland, 278 AD2d 396 [2d Dept 2000].)

The court referred this action to the Special Referee pursuant to CPLR 3104(c), which provides that "[a] referee under this section shall have all the powers of the court under this article except the power to relieve himself of his duties, to appoint a successor, or to adjudge any person guilty of contempt." CPLR 3104(d) further provides:

Any party or witness may apply for review of an order made under this section by a referee. The application shall be by motion made in the court in which the action is pending within five days after the order is made. Service of a notice of motion for review shall suspend disclosure of the particular matter in dispute. If the question raised by the motion may affect the rights of a witness, notice shall be served on him personally or by mail at his last known address. It shall set forth succinctly the order complained of, the reason it is objectionable

and the relief demanded.

On this record, defendants' motion should be granted to the extent of directing plaintiff to file the note of issue. Plaintiff acknowledges his failure to file the note of issue, contending that discovery remains outstanding in the action. However, plaintiff fails to address the numerous rulings of the Referee which determined that further discovery had either already been produced or had been waived by plaintiff. For example, plaintiff contends that the Holland defendants failed to produce "unredacted" documents on the ground that they are privileged. (P.'s Aff. In Opp., ¶ 5.) However, he fails to acknowledge that the Special Referee conducted an exhaustive in-camera review, and made rulings on defendants' claims of privilege regarding the subject documents. (See Referee's Transcript dated December 9, 2009 [Ds.' Motion, Ex. D].) Similarly, plaintiff contends that the Holland defendants failed to respond to a first set of interrogatories, but fails to acknowledge that the Special Referee struck the interrogatories by order dated June 16, 2009. (See Referee's Transcript at 3 [Ds.' Motion, Ex. B].) Significantly, plaintiff never made a timely motion to vacate the Referee's orders, and waited until filing this cross-motion to object to the orders.

Plaintiff also contends that the Referee erred in ordering the note of issue to be filed prior to completion of a deposition in Connecticut of Mark Saunders, a partner who was also "expelled" from Holland. By motion dated March 12, 2010 in the Connecticut court (see Ds.' Reply, Ex. H), plaintiff moved to compel the Saunders deposition. By order dated March 26, 2010 (P.'s Ex. A), the Connecticut court referred issues regarding the conduct of the deposition to Special Referee Lowenstein. Previously, however, by decision on the record on March 2, 2010 (Ds.' Ex. H), Referee Lowenstein had expressly deferred to the Connecticut court to resolve

Saunders' objections. Thus, by the time of the Connecticut court's order on March 26, 2010, plaintiff was aware that Referee Lowenstein had deferred to the Connecticut court. Rather than moving in Connecticut prior to March 31, the date the note of issue was required to be filed, plaintiff waited until April 7, 2010 to move in Connecticut. Moreover, plaintiff never made a timely motion to vacate the Special Referee's order directing the filing of the note of issue.

Under these circumstances, the court finds that there was an adequate basis in the record for the Referee's implicit finding that discovery was complete and for his April 2, 2010 order recommending that plaintiff be given a final extension to file the note of issue.

The court has considered plaintiff's remaining bases for opposition to the Referee's recommendation that plaintiff file his note of issue, and finds them to be without merit.

In contrast, the court, in its discretion, declines to accept the recommendation of the Special Referee that the court impose costs and attorney's fees upon plaintiff based on allegedly frivolous conduct on plaintiff's part. The Referee's finding that plaintiff's conduct was frivolous appears to be based solely on plaintiff's delay in filing the note of issue. The court does not, however, find that this conduct rose to the level of harassment or other frivolous conduct within the meaning of Part 130. To the extent that the Referee's order was based on other, earlier discovery defaults by plaintiff, the Referee has not outlined the particular defaults which would support a sanctions finding.

It is accordingly hereby ORDERED that the motion of the Holland defendants is granted only to the extent that it is

ORDERED that the report of Special Referee Leslie Lowenstein dated April 2, 2010 is hereby confirmed to the extent that it is

ORDERED that plaintiff is directed to file the note of issue and certificate of readiness within five (5) days after service of a copy of this order with notice of entry; and it is further

ORDERED that in the event of plaintiff's failure to comply with the above provision, plaintiff's action shall be deemed dismissed; and it is further

ORDERED that plaintiff's cross-motion is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
October 18, 2010



MARCY FRIEDMAN, J.S.C.

FILED
OCT 25 2010
COUNTY CLERK'S OFFICE
NEW YORK